

CHAPTER 2

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ROMAN LAW AND THE INTELLECTUAL HISTORY OF INTERNATIONAL LAW

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1 INTRODUCTION

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THE pivotal role of Roman law is well established in the historiography of the civil law tradition. Compared to this, its role in the intellectual history of international law is a marginal subject. It has rather drawn scholarly attention as an object of theoretical contention than of substantial scrutiny. Debates turn around two questions: one pertains to the continuity between ancient Roman and modern public international law and the other to the significance of the medieval and early-modern jurisprudence of Roman *private* law for the development of public international law.

The traditional understanding by international lawyers of the history of their field, which was articulated around 1900, has cast a long shadow over the subject. This articulation coincided with the heyday of the sovereign state, positivism, and European imperialism. It is both state- and Eurocentric.¹ Under the traditional

¹ M Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19

narrative, international law's history only truly began with the emergence of the sovereign state. Its intellectual history started with the first systematic expositions of international law as an autonomous body of law regulating relations between states. By and large, writers of the nineteenth century referred to Hugo Grotius (1583–1645) for this history.² Around 1900, different scholars began to reevaluate the significance of contributions from the sixteenth century, in particular from the Spanish neo-scholastics and a few jurists.³ Since the middle of the twentieth century, the accepted account is that the Spanish neo-scholastics and the humanists stood at the inception of international law as an intellectual field, casting anything which came earlier into the shadows. This view has a deep impact on the debate about the contribution of Roman law to the intellectual history of international law, in both its dimensions.

First, since the nineteenth century, scholars have debated whether there is enough continuity between the 'international law' of the Romans—and by extension that of the whole of Antiquity—and modern international law to include the former in the history of the latter. Many international lawyers of the nineteenth and early twentieth centuries held to the view that the normative systems of international relations of the ancients were altogether too primitive and different to be considered 'international law'. Among the various arguments which have been forwarded for this, two stand out. The first argument is that the great civilizations of Antiquity, and most of all the Roman, were imperialist, leaving no room for equality between states, which was considered a precondition for any international law. The second argument holds that the normative system of the ancients with regards to external relations was embedded in religion. By consequence, it was unilateral and not based on consent.⁴ These explanations tie in with state-centric and positivist understandings of international law. After the Second World War,

Rechtsgeschichte 152–76; Y Onuma, 'Eurocentrism in the History of International Law' in Y Onuma (ed), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (OUP Oxford 1993) 371–86.

² See eg DHL von Ompteda, *Literatur des gesamten natürlichen und positiven Völkerrechts* (2 vols Regensburg JL Montags & Erben 1785 reprinted Scientia Aalen 1963); R Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Greeks and the Romans to the Age of Grotius* (2 vols Buttersworth London 1795 reprinted Lawbook Exchange Clark 2005).

³ James Brown Scott (1866–1943) was instrumental in promoting the Spanish neo-scholastics, in particular the theologians Francisco de Vitoria (c 1480–1546) and Francisco Suárez (1548–1617). His *Classics of International Law* (38 vols Carnegie Endowment for International Peace 1911–1950) did much to create a classical text canon of the law of nations. The series included works by the jurists Pierino Belli (1502–1575), Baltasar Ayala (1548–1584), and Alberico Gentili (1552–1608).

⁴ C Focarelli, 'The Early Doctrine of International Law as a Bridge from Antiquity to Modernity and Diplomatic Inviolability in 16th- and 17th-Century Practice' in R Lesaffer (ed), *The Twelve Years Truce (1609): Peace, Truce, War and Law in the Low Countries at the Turn of the 17th Century* (Martinus Nijhoff Leiden forthcoming) ch 11. See also A Nussbaum, 'The Significance of Roman Law in the History of International Law' (1952) 100 *University of Pennsylvania Law Review* 678–89, at 678–81.

several historians of international law challenged and introduced a more relative definition of ‘international law’, expanding it to all forms of law regulating relations between independent polities, regardless of its religious foundations. This has allowed the indication of the existence of some form of ‘international’ law for different periods of Antiquity.⁵ In most recent times, the view has been forwarded that even hegemony and empire did not signal the end of Roman ‘international law’. The Roman Empire had to contend at all times with at least one equal empire, first the Parthian (until 224 CE) and then the Sassanid.⁶ Also, the Roman Empire dealt with its ‘barbarian’ neighbours as well as client states using the rules and procedures of ‘international law’.⁷

The acknowledgement of the existence of Roman ‘international law’ does not, however, exhaust the debate on its relevance for modern international law. The question remains whether Roman international law forms a relevant part of modern international law’s history. While there is no support for the idea that Roman and modern international law are parts of one evolving system, there is growing consent that certain customs, institutions, and doctrines of the Romans are at the root of their modern variants. In some cases, one can speak of a continuous process—as for *amicitia*⁸ or *bellum justum*⁹—while in other cases, medieval and humanist rediscoveries of Roman law were more instrumental—as with *occupatio* or *uti possidetis*.¹⁰

Secondly, nineteenth-century international lawyers were very aware—more so than their present-day successors—that medieval Roman as well as canon lawyers discussed subjects of ‘international law’, but with few exceptions they took a negative view of the work of these medieval scholars. Their reasons varied, but the common denominator was that they considered it proof of the lack of autonomy

⁵ DJ Bederman, *International Law in Antiquity* (CUP Cambridge 2001); W Preiser, ‘Die Epochen der antiken Völkerrechtsgeschichte’ (1956) 11 *Juristenzeitung* 737–44; K-H Ziegler, ‘Conclusion and Publication of International Treaties in Antiquity’ (1995) 29 *Israel Law Review* 233–49.

⁶ K-H Ziegler, *Die Beziehungen zwischen Rom und die Partherreich: Ein Beitrag zur Geschichte des Völkerrechts* (Steiner Wiesbaden 1964); B Dignas and E Winter, *Rome and Persia in Late Antiquity: Neighbours and Rivals* (CUP Cambridge 2007).

⁷ N Grotkamp, *Völkerrecht im Prinzipat: Möglichkeit und Verbreitung* (Nomos Baden 2009); D Nörr, *Imperium und Polis in der hohen Prinzipatszeit* (2nd edn Beck Munich 1969); R Schulz, *Die Entwicklung des römischen Völkerrecht im vierten und fünften Jahrhundert* (Steiner Stuttgart 1993).

⁸ B Paradisi, ‘L’amicizia internazionale nell storia antica’ and ‘L’amicizia internazionale nell’ alto medio evo’ in *Civitas Maxima: Studi di storia del diritto internazionale* (Olschki Florence 1974) vol 1, 296–338 and 339–97.

⁹ SC Neff, *War and the Law of Nations: A General History* (CUP Cambridge 2005) at 34–8 and 46–9.

¹⁰ R Lesaffer, ‘Argument from Roman Law in Current International Law’ (2005) 16 *European Journal of International Law* 25–58, at 38–56; L Winkel, ‘The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law’ in R Lesaffer (ed), *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War I* (CUP Cambridge 2004) 222–37, at 222–4.

of international law.¹¹ Over the twentieth century, as positivist and state-centred readings of the history of international law receded, scholars took a more neutral view of the role of medieval jurisprudence but the subject in general was met with blanket neglect. The view that the intellectual history of international law really took off in the sixteenth century still holds sway. Studies of medieval Roman and canonistic jurisprudence on matters of international relations remain extremely rare.¹²

The main thrust of this chapter is to correct the existing imbalance in current scholarship that largely ignores or at least underestimates the influence of Roman law on the development of international law. This is done by offering a general survey of the historical interactions between Roman law and international law, drawing from general insights into the intellectual history of law in Europe that have remained remarkably absent in the grand narrative of the history of international law. The focus will be on the periods in which these interactions were most pronounced. Next to Roman Antiquity these are the Late Middle Ages (eleventh to fifteenth centuries) and the Early Modern Age (sixteenth to eighteenth centuries).

2 ROMAN ANTIQUITY (SEVENTH CENTURY BCE–SIXTH CENTURY CE)

The oldest traces of Roman ‘public international law’, in the sense of law regulating relations with other polities, are to be found in the context of the *jus fetiale*. This refers to the rites of the fetial priests used among others to bind the Roman people to treaties with a foreign people or to declare war.¹³ The *jus fetiale* offers an example of the fact that among ancient civilizations the norms and procedures regulating foreign relations were binding because of religious sanction—the invocation of a curse of the gods on the Roman people. It was a body of procedures and underlying norms that dealt with, among other things, foreign relations. It was not of international but Roman origin. This did not impede it from forming an effective ground

¹¹ R Lesaffer, ‘Roman Law and the Early Historiography of International Law: Ward, Wheaton, Hosack and Walker’ in T Marauhn and H Steiger (eds), *Universality and Continuity in International Law* (Eleven International The Hague 2011) 149–84.

¹² Such exceptions are P Haggemacher, *Grotius et la doctrine de la guerre juste* (PUF Paris 1983); J Muldoon, ‘Medieval Canon Law and the Formation of International Law’ (1995) 112 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 64–82.

¹³ Livy, *The History of Rome*, 1.24.4 and 1.32.6. See also A Watson, *International Law in Archaic Rome: War and Religion* (Johns Hopkins University Press Baltimore 1993).

on which to vest binding relations. There is historical evidence of the Romans making treaties whereby both parties invoked their own gods.¹⁴

As the Romans expanded their power over Italy and the Mediterranean between the fourth and the first century BCE, a greater body of institutions and norms about matters of war and peace, trade, seafaring, and diplomacy developed. Far from only imposing their own customs and ideas, the Romans adopted and adapted those of other peoples such as the Greeks and Carthaginians. The Roman version of ‘public international law’ extended far beyond the restricted and religion-based *jus fetiale*.¹⁵ As these peoples had in turn been inspired by the ‘international law’ of the great civilizations of the Ancient Near East, such as the Egyptians, Assyrians, and older Mesopotamian empires, one may speak of a measure of continuity between pre-classical, Greek and Roman ‘international law’.¹⁶

Little of the Roman practice and doctrine of international law has found its way into the compilation of Roman law of the Emperor Justinian (529–65).¹⁷ The main title in the *Digest* covering matters of war and peace is D 49.15 *De captivis et de postliminio redemptis ab hostibus*.¹⁸ Far more informative to modern scholars have been historical texts—such as those by Polybius (c 200–118 BCE) and Livy (59 BCE –17 CE)—as well as rhetorical and philosophical works—chiefly by Cicero (106–43 BCE). It is important to note that most of the latter textual canon was unknown to the medieval jurists so they had only the information from the *Digest* and the other parts of Justinian’s compilation to go on. The major historical and rhetorical sources would only be rediscovered and studied by the humanists.

Let us now briefly look at the material substance of Roman international law. Roman legal practices and doctrines in relation to foreign affairs covered all of the major subjects which would constitute ‘international law’ until deep into the nineteenth century: war and peace, treaties, diplomacy, and (maritime) trade.¹⁹

The term *jus belli ac pacis* which Grotius would later use to refer to the laws of war and peace-making in the sense of *jus ad bellum*, *jus in bello*, and *just post bellum* came from a speech by Cicero.²⁰ The Romans knew a rudimentary *jus ad bellum* in their concept of *bellum justum et pium*. Under the *jus fetiale* a war had to be formally declared upon the enemy after the Romans sought redress for the wrong the enemy had allegedly committed. War was an enforcement action after injury,

¹⁴ ‘Conclusion and Publication of International Treaties in Antiquity’ (n 5) 234–9.

¹⁵ ES Gruen, *The Hellenistic World and the Coming of Rome* (University of California Press Berkeley 1984) chs 1–5.

¹⁶ R Ago, ‘The First International Communities in the Mediterranean World’ (1982) 53 *British Yearbook of International Law* 213–32.

¹⁷ All translations from the *Digest* are from A Watson (ed), *The Digest of Justinian* (2 vols revised edn University of Pennsylvania Press Philadelphia 1998).

¹⁸ See also *Codex Justiniani* 8.50.

¹⁹ For a survey, K-H Ziegler, *Völkerrechtsgeschichte: Ein Studienbuch* (2nd edn Beck Munich 2007) at 35–61.

²⁰ Cicero, *Pro Balbo*, 6.15.

as it would be in the medieval just war doctrine.²¹ Cicero mentioned two just causes for war: defence and avenging a wrong.²² Roman practice indeed shows that the Romans argued that their wars were defensive or reactions against a prior wrongdoing by the enemy.²³ Roman law distinguished war between public enemies, who had a right to equal treatment under the laws of war, from violence between non-public enemies; such as robbers and pirates.²⁴ In relation to *jus in bello*, the right to *postliminium* stands out. Through its place in the *Digest* (D 49.15), it became one of the Roman conceptions of the laws of war and peace which was most discussed in medieval and early-modern jurisprudence.²⁵ The Romans recognized the binding character of treaties during wartime. Main wartime treaties included armistices (*indutiae*),²⁶ safe conducts, and exchanges of prisoners.²⁷ There were two major forms of ending wars (*just post bellum*): peace treaties and surrender (*deditio*).²⁸

The Roman practice of treaty-making was similar to that of the Ancient Near East or the Ancient Greeks. Treaties were oral agreements which were confirmed by oath and invocations of the wrath of the gods in case of violation. Treaties were commonly written down and published, but this was not constitutive of their binding character. This procedure would remain standard until deep into the Middle Ages. The Roman term for a public treaty made according to this procedure was *foedus*. As the Roman network of foreign relations expanded territorially, it became unpractical to have the treaties confirmed by *fetiales*. Their role in the making of treaties was assumed by magistrates—and later the emperor—while the ritual character of the procedure lessened.²⁹ Next to *foedus*, the Romans used more informal ways of making treaties. There was the *sponsio* whereby magistrates who had not been mandated by the people or senate made a treaty through the mutual exchange of promises. The people or senate retained the right to reject the treaty afterwards.

²¹ *War and the Law of Nations* (n 9) 34–8 and 45–68; J von Elbe, ‘The Evolution of the Concept of Just War in International Law’ (1939) 33 *American Journal of International Law* 665–88, at 666–7.

²² Cicero, *De re publica*, 3.35a.

²³ *International Law in Antiquity* (n 5) 207–41; WV Harris, *War and Imperialism in Republican Rome 327–70 BC* (Clarendon Press Oxford 1979) 175–254.

²⁴ *Digest* (n 17) 49.15.24.

²⁵ *Ibid* 49.15.5 for prisoners of war; 49.15.19 for property; 41.1.5.7 for the basis of Roman right of booty (*jus praedae*). See also *International Law in Antiquity* (n 5) 242–60; J Plescia, ‘The Roman “Ius Belli”’ (1989–1990) 92–3 *Bullettino dell’istituto di diritto romano Vittorio Scialoja* 497–523.

²⁶ *Digest* (n 17) 49.15.19.1.

²⁷ K-H Ziegler, ‘Kriegsverträge im antiken römischen Recht’ (1985) 102 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 40–90.

²⁸ C Baldus, ‘*Vestigia pacis*: The Roman Peace Treaty: Structure or Event’ in *Peace Treaties and International Law in European History* (n 10) 103–46; K-H Ziegler, ‘Friedensverträge im römischen Altertum’ (1989) 27 *Archiv des Völkerrechts* 45–62; ‘Kriegsverträge im antiken römischen Recht’ (n 27) 51–6, 67–70, 79–86.

²⁹ A Nussbaum, ‘Forms and Observance of Treaties in the Middle Ages and the Early 16th Century’ in GA Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen’s Pure Theory and Related Problems in International Law* (University of California Press Berkeley 1953) 191–8; ‘Conclusion and Publication of International Treaties in Antiquity’ (n 5).

Furthermore, the Romans applied the concept of good faith (*bona fides*)—which had been inspired by its Greek analogue (πίστις)—to treaties.³⁰ Two important types of relationships, next to peace and alliance, were *amicitia* and *hospitium*. *Amicitia* (friendship) entails a mutual recognition of equality and is the precondition on which to vest peaceful relations. It lays down the foundations for further legal relations between peoples. It can either be established through treaty or in a more informal way.³¹ *Hospitium* (guest friendship) is a treaty whereby two polities promise legal protection to one another's subjects. As such, it is the basis for trade.³² Finally, the Romans knew the principle of the inviolability of diplomats.³³

But the major contribution Roman law made to the intellectual history of international law is probably through the introduction of the term *jus gentium* and its multiple meanings. Originally, *jus gentium* (law of nations) did not refer to relations between polities. It was the law the Roman magistrates applied to foreigners. In this respect, it was a kind of 'universal' private law, albeit of Roman making. It was a set of *formulae*—written documents allowing a case to be taken to court—which were introduced by the magistrate who had jurisdiction over foreigners in Rome, the *praetor peregrinus* (from 242 BCE). Although its development was as casuistic as that of the *jus civile*, it had a higher level of abstraction than the latter as the *praetor peregrinus* had to span differences between the legal cultures involved.³⁴

With time, Roman orators and jurists made three semantic moves with *jus gentium*. First, a close association was made between *jus gentium* and *jus naturale*. The Romans adopted the notion of humanity as a universal community and natural law as a universal law innate in (human) nature from Greek Stoic philosophy. Cicero, who played a significant role in transferring Greek philosophical ideas into the Roman literary tradition, associated *jus gentium* with natural law.³⁵ The association was reiterated by Gaius (second century CE) in a text also quoted in the *Digest*.³⁶ It highlighted the universal as well as foundational dimension of *jus gentium*. Whereas in fact it was the product of inductive generalization from Roman and foreign legal

³⁰ D Nörr, *Die Fides im römischen Völkerrecht* (Müller Heidelberg 1991); 'Conclusion and Publication of International Treaties in Antiquity' (n 5); *Völkerrechtsgeschichte* (n 19) 39–40.

³¹ PJ Burton, *Friendship and Empire: Roman Diplomacy and Imperialism in the Middle Republic (353–146 BC)* (CUP Cambridge 2011); A Heuss, 'Die völkerrechtlichen Grundlagen der römischen Assenpolitik in republikanischer Zeit' (1933) 13 *Klio Beiheft* 1–59, at 46; B Paradisi, 'L'amitié internationale: les phases critiques de son ancienne histoire' (1951) 78 *Recueil des Cours* 325–78.

³² *International Law in Antiquity* (n 5) 120–36; K-H Ziegler, 'Regeln für den Handelsverkehr in Staatsverträgen des Altertums' (2002) 70 *Legal History Review* 55–67.

³³ *Digest* (n 17) 50.7.18; *International Law in Antiquity* (n 5) 88–119; TRS Broughton, 'Mistreatment of Foreign Legates and the Fetal Priests: Three Roman Cases' (1987) 41 *Phoenix* 50–62.

³⁴ M Kaser, *Jus gentium* (Böhlau Köln 1993).

³⁵ Cicero, *De officiis* 3.23: 'The same thing is established not only in nature, that is in the law of nations...'. Translation from Cicero, *On Duties* (MT Griffin and EM Atkins eds and trans) (CUP Cambridge 1991) at 108.

³⁶ *Digest* (n 17) 1.1.9 (Gaius 1.1): '...By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium*, as being the law which all nations observe.'

systems, the Ciceronian move laid the foundation for later conceptions of *jus gentium* as the legal expression of immutable and universal principles.

Secondly, the classical jurist Ulpian (*d* 223/224) defined natural law as the law common to all animals, while *jus gentium* was the law common to all men. Ulpian did not state that *jus gentium* was the natural law of mankind, but many have understood it to be so.³⁷

Thirdly, in the *Digest* a definition of *jus gentium* is to be found that encompasses both the original meaning of universal private law as that of a law of foreign relations. In D 1.1.5 the post-classical jurist Hermogenian (lived c 300) defined *jus gentium* as the law whereby ‘...wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through *jus civile*).’ The definition of Saint Isidorus, Bishop of Seville (*d* 636) in his *Etymologiae* only included aspects of foreign relations, except for one (mixed marriages).³⁸

With these steps, Roman jurisprudence bequeathed to the Middle Ages a concept of *jus gentium* that spanned two meanings: that of a universal law, which might well apply to individuals as to polities; and that of a law applicable to relations between polities. It also bequeathed a strong association between *jus gentium* and *jus naturale*.³⁹

3 THE LATE MIDDLE AGES (ELEVENTH TO FIFTEENTH CENTURIES)

Late-medieval jurists did not perceive of *jus gentium* as an autonomous body of law governing relations between independent political entities. Neither did they make it into an autonomous academic discipline with its own literature. But this did not prevent them from writing extensively, and with a great deal of sophistication,

³⁷ Ibid 1.1.1.3–4, see 4: ‘*Jus gentium*, the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since the latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.’

³⁸ Isidorus, *Etymologiae*, 5.6: ‘The law of nations concerns the occupation of territory, building, fortification, wars, captivities, enslavements, the right of return, treaties of peace, truces, the pledge not to molest embassies, the prohibition of marriages between different races. And it is called the “law of nations” because nearly all nations use it.’ Translation from Isidorus, *The Etymologies of Isidore of Seville* (SA Barney et al eds and trans) (CUP Cambridge 2006) at 118.

³⁹ K Tuori, ‘The Reception of Ancient Legal Thought in Early Modern International Law’ in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP Oxford 2012) 1012–33, at 1016–8.

on issues relating to war, peace, treaties, diplomacy, and trade between polities and thus making a significant contribution to the intellectual development of international law.

The rediscovery of a full copy of the *Digest* in the third quarter of the eleventh century marked the beginning of medieval jurisprudence. By the end of the century, Roman law was taught on the basis of Justinian's compilation—known since the sixteenth century as the *Corpus Juris Civilis*—at the emerging university of Bologna. By the end of the twelfth century, university teaching of the *jus civile* had spread over Italy, France, Spain, and England. In the fifteenth and sixteenth centuries it spread to the centre, north, and east of Europe.

But the study of Roman law was only one branch of the learned law of the Late Middle Ages. The Gregorian Reform of the mid-eleventh century and the ensuing rise of the papal monarchy led to the growth of canon law into an extensive and sophisticated body of law. It became the subject of study at university schools of canon law. Around 1140, an authoritative collection of canon law was made by Gratian, the *Decretum Gratiani*. It quickly became the standard source for the discipline. In 1234, Pope Gregory IX (r 1227–1241) promulgated the *Liber Extra*, a codification of canon law from after the *Decretum*, at one and the same time stamping his authority on Gratian's work. Together with the *Liber Sextus* (1298) and two smaller collections from the fourteenth century, these texts constituted the authoritative sources of canon law. The collection was later named the *Corpus Juris Canonici*. As opposed to Roman law, which was not directly applicable law in most places in Europe, canon law was the applicable law of the Church. Through its hierarchical network of courts and the wide jurisdiction it claimed in matters such as family or contract law, it had a huge impact on the legal development of Europe. As canon law had adopted much from Roman law, it was an important factor in the reception of Roman law as well.⁴⁰

Roman and canon law form the twin branches of the late-medieval jurisprudence of the Latin West, the *jus commune*. The civilians and canonists were scholastics as much as the theologians were, and they made a significant contribution to the development of scholastic theory and methodology. The foundational tenet of scholasticism was that truth as revealed by God was laid down in authoritative texts. This was a vast and expanding collection of texts including the Bible, the writings of the Church Fathers, the works of some ancient philosophers such as Plato and Aristotle, and the two *corpora* of Roman and canon law. The authority of the texts was absolute. One should be capable of extracting from the totality of the sources an objective, immutable, and consistent truth. Translated to the world of law this implied that the study of the Justinian and/or canon law texts should

⁴⁰ J Brundage, *Medieval Canon Law* (Longmans London 1995) 44–56; RH Helmholz, *The Spirit of Classical Canon Law* (University of Georgia Press Athens 1996) 1–32.

lead to the discovery of a law which was complete, consistent, timeless, universal, and which provided a just solution to any legal problem. Scholastic logic—dialectics—was the sophisticated tool the medieval scholars developed to bridge the gap between the idealism of their claims and the reality of the texts.⁴¹

Legal historians distinguish two major, subsequent ‘schools’ in the study of Roman law in the Middle Ages. First came the glossators. Their endeavours culminated in the *Glossa Ordinaria* by Accursius (c 1182–1263). After these came the commentators, who would dominate most European law schools until the seventeenth century. For canonists, a parallel distinction is made between decretists and decretalists with the promulgation of the *Liber Extra* as the dividing line. It is hard to pinpoint the differences between the glossators and commentators, but in general terms medieval jurisprudence can be understood in terms of an incremental shift from text to content. Whereas the first generations of civilians were mostly concerned with understanding and explaining the authoritative text itself, the later generations took more distance from the texts in their search for the ideal law they hoped to extract from them. This is best illustrated by referring to the main genres of literary production of the two schools. The glossators wrote their explanations down in the form of *glossae*. These were accumulating layers of (mostly marginal) notes in which they offered textual or content explanations, pointed at parallel locations, and reasoned away contradictions. The commentaries of the later civilians were longer discussions on larger fragments of the *Corpus Juris Civilis*, allowing for more systematization and above all, freedom. This enhanced autonomy was even more evident with treatises, which were expositions on a certain topic whereby the author could order his sources freely. Treatises started to emerge from the fourteenth century onwards but only truly broke through in the sixteenth century. The shift from text to content also caused the civilians to expand their canon of texts. They addressed legal questions by applying different sources to the matter, spanning Roman law, canon law but also *jura propria*. Furthermore, the medieval civilians were increasingly involved with practice. Professors of the *jus civile* were frequently asked to render a legal advice in current disputes. Leading commentators such as Bartolus of Saxoferrato (1314–1357) and Baldus de Ubaldis (1327–1400) wrote numerous *consilia*.⁴²

AQ:
‘a legal
advice’ ok?

Medieval civilians as well as canonists wrote extensively about matters of war and peace, diplomacy, and trade. They developed sophisticated doctrines on these subjects. For the most parts, these writings are not to be found in self-standing texts, but were fully part and parcel of their writings on law in general. Much of the relevant medieval scholarship therefore needs to be extracted from the glosses

⁴¹ W Ullmann, *Medieval Foundations of Renaissance Humanism* (Cornell University Press London 1977) at 14–29.

⁴² R Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP Cambridge 2009) at 252–65.

and commentaries of both civilians and canonists all throughout their works. Furthermore, numerous *consilia* by the commentators are relevant. These could involve *consilia* written for the purpose of a case before a feudal, royal, or imperial court. But it could also pertain to diplomatic disputes, which were not brought into court.⁴³ Canon law even had a more direct connection to practice as ecclesiastical courts—with the papal *Rota Romana* at the apex of the hierarchy—held jurisdiction over major issues of diplomacy such as the violation of treaties confirmed by oath and claims to the justice of war.⁴⁴

From the fourteenth century onwards, a limited number of treatises on relevant subjects were produced. Most notably among these are the treatise on reprisals by Bartolus,⁴⁵ the treatises on war, reprisals and duels by Giovanni da Legnano⁴⁶ as well as the treatises by the fifteenth-century Italian canon lawyer Martinus Garatus Laudensis on diplomacy and treaties.⁴⁷ The great collection of fifteenth and sixteenth century canon law treatises *Tractatus Universi Juris* contains some additional tracts on war and peace as well as diplomacy.⁴⁸ From the fifteenth century, there are more treatises on diplomacy and diplomatic law.⁴⁹

Medieval civilians and canonists discussed matters of war, peace, trade, and diplomacy in their glosses and commentaries at those places where they found a *sedes materiae*, literally ‘a seat of the matter’ in the authoritative text. As has already been indicated, the Justinianic collection held relatively little information on the Roman ‘international law’. The main titles from the *Digest* were D 1.1 *De iustitia et jure*, D 49.15 which dealt with prisoners of war, *postliminium* and treaties,⁵⁰ D 49.16 *De re militari* which covered matters of military discipline and

⁴³ Jurisprudence also had its influence on diplomatic practice felt through the role of jurists in that practice—as ministers or diplomats—as well as through the use of public notaries to make diplomatic instruments such as treaties. Important collections on notarial practice such as the *Speculum judiciale* (c 1290) of Gulielmus Durantis (c 1237–1296) contained examples of diplomatic instruments: *Speculum juris* (Basel Frobenii 1574, reprinted Aalen Scientia 1975) 4.1 *De treuga et pace*.

⁴⁴ *The Spirit of Classical Canon Law* (n 40) 126–7; R Lesaffer, ‘Peace Treaties from Lodi to Westphalia’ in *Peace Treaties and International Law in European History* (n 10) 9–41, at 22–6.

⁴⁵ See Bartolus, ‘Tractatus Represaliarum’ in *Consilia, questiones, et tractatus [...]* (Venetiis per Batistam de Tortis 1529 reprinted Il Cigno Galileo Galilei Rome 1996) at 115vb–120va.

⁴⁶ Giovanni da Legnano, *Tractatus De Bello, De Represaliis et De Duello* (TE Holland ed) (2 vols OUP Oxford 1917 [1477]).

⁴⁷ Martinus Garatus Laudensis, *De legatis et legationibus tractatus varii* (VE Grabar ed) (C Mattiesen Dorpat 1905 [1625]); Martinus Garatus Laudensis, *Tractatus de confederatione, pace et conventionibus principum* in *Peace Treaties and International Law in European History* (n 10) 412–47.

⁴⁸ *Tractatus Universi Juris* (Venetiis apud Franciscum Zilettum 1584–1586) vol 16 (*De dignitate et potestate seculari*) (with treatises by Garatus and Belli but also with treatises on war by Johannes Lupus and Franciscus Arias, all known to Grotius) but also vols 10–12 (with treatises on truce and peace by Octavianus Volpelli and Nicolaus Moronus).

⁴⁹ See B Behrens, ‘Treatises on the Ambassador Written in the Fifteenth and Early Sixteenth Centuries’ 51 (1936) *English Historical Review* 616–27.

⁵⁰ See also *Codex Justiniani* 8.50.

jus in bello,⁵¹ as well as D 50.7 *De legationibus*, on diplomats. To this a few texts on feudal law, the *Libri feudorum*, which had made their way into the medieval version of the Justinianic codification, can be added. This allowed commentators to expand on matters of political organization and public authority. As relevant was the addition of the *Pax Constantiae* of 1183 between Emperor Frederick I (r 1155–1190) and the Lombard League, which elicited writings on peace-making and peace treaties.⁵² The main locations in the *Corpus Juris Canonici* were Gratian on just war⁵³ and the title *De treuga et pace* from the *Liber Extra*.⁵⁴

This all in all limited basis did not prevent medieval jurists from dealing extensively with international relations; quite the contrary. Civilians, as well as canonists, did not have to restrict themselves to Roman ‘international law’ texts to apply to matters of war, peace, trade, and diplomacy. The whole range of authoritative texts could be brought to bear on these subjects. The civilians applied a multitude of texts and doctrines from Roman law which in origin bore no relation to these matters. Many of these stemmed from Roman private law. The main examples of these ‘transplants’ include the use of contract law in relation to treaties,⁵⁵ property law in relation to territory and boundaries (*jus finium*)⁵⁶ as well as *jus in bello* and *jus praedae*,⁵⁷ the law of delict and criminal law in relation to the use of force, Roman private arbitration in the context of arbitration between princes and polities,⁵⁸

⁵¹ See also Ibid 12.35. For a more complete survey of relevant passages in the Justinianic texts, see A Wijffels, ‘Early-Modern Scholarship on International Law’ in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Cheltenham 2011) 23–60, at 29–32 and see especially K-H Ziegler, ‘Die römische Grundlagen des europäischen Völkerrechts’ (1972) 4 *Ius Commune* 1–27.

⁵² Odofredus (d 1265) and Baldus de Ubaldis wrote extensive commentaries on the *Pax Constantiae*. See also Baldus on LF 2.27 *De pace tenenda, et eius violatoribus* from the *Libri feudorum* as well as *Consilium* 2.195 in Baldus, *Consilia* (Venice 1575 reprinted Bottega d’Erasmus Turin 1970); R Lesaffer, ‘Gentili’s *ius post bellum* and Early Modern Peace Treaties’ in B Kingsbury and B Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP Oxford 2010) 210–40, at 216–7; K-H Ziegler, ‘The Influence of Medieval Roman Law on Peace Treaties’ in *Peace Treaties and International Law in European History* (n 10) 147–61.

⁵³ *Decretum Gratiani* 23 q 2 c 2, referring to Isidorus, *Etymologiae* 18.1.2/3. On just war in medieval theology and canon law, see J Barnes, ‘The Just War’ in N Kretzman et al (eds), *The Cambridge History of Later Medieval Philosophy* (CUP Cambridge 1982) 750–84; Grotius *et la doctrine de la guerre juste* (n 12) 51–444; *War and the Law of Nations* (n 9) 45–82; FH Russell, *The Just War in the Middle Ages* (CUP Cambridge 1975).

⁵⁴ *Liber Extra* (1234) X.1.34. For more canon law texts, see J Muldoon, ‘The Contribution of Medieval Canon Lawyers to the Formation of International Law’ (1972) 28 *Traditio* 483–97.

⁵⁵ R Lesaffer, ‘The Medieval Canon Law of Contract and Early Modern Treaty Law’ (2000) 2 *Journal of the History of International Law* 78–98.

⁵⁶ P Marchetti, *De iure finium: Diritto e confini tra tardo Medioevo ed età moderna* (Giuffrè Milan 2001).

⁵⁷ *Digest* (n 17) 43.16 (*De vi et de vi armata*) and *Codex Justiniani* 8.4.

⁵⁸ K-H Ziegler, ‘Arbiter, arbitrato und amicalis compositor’ (1967) 84 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 376–81.

as well as the use of the contract of *mandatum* for diplomats.⁵⁹ But there is also a manifold of less obvious examples, such as from succession law.⁶⁰

To the medieval jurists this came naturally. In fact, they would not have thought of this in terms of ‘transplants’, and this is for two reasons. First, although the concepts of public and private law were known and operated, they did not define distinct spheres of law yet. Neither was there a strict separation between the international and domestic legal orders. Public authority was not yet monopolized by one level of government. The order of the Latin West was one of a hierarchical continuum of polities and jurisdictions, ranging from the pope and emperor at the top over kingdoms, principalities, feudal lordships and city-states to a myriad of local authorities at the base. These all stood in some hierarchical relation to one another, having original authority or jurisdiction for some matters and being a subject power for others. The authority to engage in war, peace, and diplomacy was, by consequence, diffused over a great variety of entities and the dividing line between what constituted ‘public’ and ‘private’ was not clear. While this certainly troubled medieval jurists, the question whether a certain use of force was an instance of public war or private violence was not always easy to answer. The jurists did refer to the law applicable to international relations as *jus gentium* but that was not the full or exclusive meaning of the term. Its primary meaning was that of a universal law and the distinction between universal private law and public international law was collapsed in it as it was in reality.⁶¹

Secondly, the medieval jurists did not conceive of a separate jurisprudence of international law, as they did not conceive of their field as fragmented in any way. The law to be found in the authoritative sources of Roman and canon law was not only timeless and universal; it was also ‘whole’. It was permeated by one objective, absolute truth, ultimately vested in divine revelation. Principles and rules which applied to one subject were necessarily valid for others. This concept of ‘totality’⁶² went beyond the law. It stretched to any other field of study, most significantly theology.

In relation to international law as to any other aspect of the law, civil and canon law were more than just two pillars of the *jus commune*. They operated in close conjunction. Many medieval jurists had been exposed to the two branches of the learned law as students and many scholars drew from both textual canons in dealing with concrete issues. It is actually in the interplay between Roman law and canon law (and theology) that medieval jurisprudence was at its most creative and

⁵⁹ DE Queller, *The Office of the Ambassador in the Middle Ages* (Princeton University Press Princeton 1967).

⁶⁰ See the use of *Digest* 24.3.38 by Martinus Garatus Laudensis in *Tractatus de confederatione, pace et conventionibus principum* (n 47) 425 q xxix.

⁶¹ SC Neff, ‘A Short History of International Law’ in MD Evans (ed), *International Law* (2nd edn OUP Oxford 2006) 3–31, at 6–7.

⁶² *Medieval Foundations* (n 41) 14–19.

made its most valuable contributions to the civil law tradition and the jurisprudence of international law. To this, two remarks may be added. First, even when they were dealing with similar questions, Roman lawyers on one side and theologians and canon lawyers on the other had different focuses. The primary concern of theologians and canon lawyers in raising legal questions was what man's behaviour would do to his eternal life. Whether his actions constituted sins or not. In this respect, their law applied in the forum of conscience (*forum internum*) and was first and foremost centred on general rules of morality. Canon law was at the same time the law applicable and enforceable in ecclesiastical courts and thus also pertained to the *forum externum*, providing sanctions in the here and now. In consequence, it was also a detailed and sophisticated technical body of law. The primary focus of Roman lawyers was on the here and now, on the legal effects and sanctioning of human behaviour by other humans. Secondly, in very general terms, one could say that in the interplay between canon and Roman law, the former brought in the general (moral) principles and the latter the technical elements. The formulation of the principles of *pacta sunt servanda* and the general liability for compensation of wrongful damages offer important examples of this.⁶³

4 THE EARLY MODERN AGE (SIXTEENTH TO EIGHTEENTH CENTURIES)

The first half of the sixteenth century saw the collapse of the medieval legal order of the Latin West. The Reformation made what had been the foundation of its unity into the fault line of its fracture. By the middle of the century, approximately half of Europe rejected the authority of the pope, the ecclesiastical courts, and canon law, thus tumbling one of two pillars on which the order of Europe rested. By the end of the century, canon law had also ceased to play a major role in international relations within the Catholic world. The conquests in the Americas caused the need, at least in the eyes of many, for an international law which was not based on Roman or canon law. The emergence of powerful composite monarchies led to the final destruction of the universal claims of the emperor and the pope in secular, and sometimes even spiritual, matters. Together with the influence of humanism, this led to a gradual 'nationalization' of civilian jurisprudence.⁶⁴

⁶³ W Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca 1500–1650)* (Martinus Nijhoff Leiden 2013) at 105–61; J Gordley, *The Philosophical Origins of Modern Contract Law* (OUP Oxford 1991).

⁶⁴ See *European Legal History* (n 42) 303–8.

The ensuing crisis of international order of the West would endure until a new legal order was articulated in the second half of the seventeenth century, *after* the Peace of Westphalia (1648), that of the *jus publicum Europaeum*. It fostered intellectual dynamism in the field of international relations and is one of the explanations behind the birth of the law of nations as an autonomous discipline. The collapse of the authority of canon law and the gradual fragmentation of Roman jurisprudence along state-lines forced scholars to look for an alternative locus of authority for the legal organization of international relations. This was to be natural law.

Modern literature has defined two major schools of thought to classify the writers of the law of nations of the sixteenth and early seventeenth centuries: neo-scholastics and humanists. While these are defensible categories, it is not always evident to what school a certain author belongs. Moreover, one should be careful not to overstate the homogeneity within each school or the differences between them. The distinction is sometimes understood as one between theologians and canon lawyers on the one hand and civilians on the other. While the picture from real life is again far more complex than that, it can be held that humanism had a significant impact on the civilian jurisprudence of the law of nations.⁶⁵

In the early sixteenth century, humanism gained a foothold at different law faculties, most famously at Bourges in France. However, humanism did not overhaul the dominant position of the commentators at most European law schools and neither did it lead, even among humanist jurists themselves, to a complete break with scholasticism, regardless of the severe criticism by humanists of it. All in all, there were very few radically consequential humanists among the jurists. On the other hand, humanism had a profound influence on civilian jurisprudence, also in relation to the law of nations. By the middle of the seventeenth century, a reformed paradigm of civilian jurisprudence was in place, which drew on both scholastic and humanist traditions.⁶⁶

The influence of humanism on civilian jurisprudence was fourfold. First, the humanists looked at the authoritative textual canon through the lens of a different paradigm than the scholastics. To them the authoritative sources stemming from Antiquity were not the repository of a revealed, absolute, universal, and timeless truth but the synthetic products of an historic civilization. They were worthy of study because the Greek and Roman cultures were considered the historical high-points of human achievement. Their authority degraded from absolute to relative, from indisputable to that of an example to be emulated. In this respect, the humanist demarche was first and foremost a historical one. The primary endeavour of humanism was to create an historically correct reconstruction of the text and its authentic meaning. However, with few exceptions, even the more radical humanists among

⁶⁵ *The Roman Foundations of the Law of Nations* (n 52); R Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 1999).

⁶⁶ 'Early-Modern Scholarship on International Law' (n 51) 35–51.

the civilians did not stop there. The historical paradigm did not prevent them from applying Roman law to current issues, much in the same way the commentators had. But, with time, later in the sixteenth century, they started to do so with more critical distance than their medieval predecessors. One took inspiration from Roman law not because it held a claim to absolute authority, but because a certain rule was the best example available. By the mid-seventeenth century, the criterion of evaluation forwarded would be accordance to reason and rational natural law. In this way, humanism helped pave the way for the Modern School of Natural Law with Grotius as the foremost transitional figure. However, until deep into the eighteenth century if not later, a self-evident association between Roman law and natural reason survived. This was helped along by the fact that a claim to rationality implied a claim to universality. Against local and national laws, Roman law could still play a trump card even if the ‘universal’ character of civilian jurisprudence withered.⁶⁷

Secondly, humanism expanded the classical textual canon of the civilians. In addition to the *Corpus Juris Civilis* and the canonistic, theological, and philosophical sources of medieval scholarship, civilians also drew on newly discovered ancient historical, rhetorical, and philosophical texts. Among others, the works of Polybius, Livy, Seneca (c 4 BCE–65 CE), Tacitus (c 56–117), and above all Cicero were brought to bear on the law of nations.

Thirdly, as the authority of Roman law became relative, humanism gave a new stimulus to widening the scope of legal argument and looking at other law systems, primarily *jura propria* and emerging national laws. In this respect, humanists contributed to the ‘nationalization’ of civilian jurisprudence, thereby undercutting the universal authority of Roman law.

Fourthly, humanism fostered the systematization of law. The replacing of the complex ‘system’ of the *Digest* with that of the more transparent *Institutes* allowed for a more rational ordering of the law and marked a new step in the emancipation from the sources. Moreover, treatises became a far more significant genre than before. From the second half of the sixteenth century, a growing number of autonomous treatises on aspects of the law of nations appeared.⁶⁸ The treatises of Belli,⁶⁹ Ayala,⁷⁰ and Gentili⁷¹ are the best-known examples of these. Grotius, who was an accomplished humanist man of letters, may be counted with them.

⁶⁷ Ibid 51.

⁶⁸ DR Kelley, ‘Civil Science in the Renaissance: Jurisprudence in the French Manner’ (1981) 3 *Journal of the History of Ideas* 261–76; *European Legal History* (n 42) 350–9; P Stein, ‘Legal Humanism and Legal Science’ (1986) 54 *Legal History Review* 297–306; J Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (CUP Cambridge 2002).

⁶⁹ P Belli, *De re militari et bello tractatus* (HC Nutting trans) (2 vols Clarendon Press Oxford 1936 [1563]).

⁷⁰ B Ayala, *De iure et officiis bellicis et disciplina militari libri III* (J Westlake ed JP Bate trans) (2 vols Carnegie Institute Washington DC 1912 [1582]).

⁷¹ Mainly A Gentili, *De iure belli libri III* (JC Rolfe trans) (2 vols Clarendon Press Oxford 1933 [1598/1612]).

These treatises are among the first attempts to treat with the laws of war and peace-making in a systematic as well as a comprehensive way. They marked the emancipation of *jus gentium* in the sense of the law regulating relations between independent polities as an autonomous discipline.⁷² Recent scholarship—particularly from the angle of the history of political philosophy—has by and large explained humanist jurisprudence in terms of a direct discovery of and interaction with ancient historical, rhetorical, and philosophical sources, almost completely ignoring the mediating role of medieval scholarship.⁷³ Some scholars who restored the humanists' entanglement with the Justinianic codification into the discussion have done this without giving acknowledgement to the fact that the humanists stood in an almost 500-year old tradition of studying Roman law and have written about this in terms of an original discovery of Roman law rather than a *rediscovery* through a different looking glass.⁷⁴

The early-modern jurists of international law related with Roman law in two different ways. First, as has been underscored in recent scholarship, they expanded their knowledge about Roman 'international law' thanks to the new discovery of ancient Roman historical, rhetorical, and philosophical sources. Secondly, they continued the dialogue with Roman law which had started in the eleventh century, albeit from a partially different perspective. The expansion of the textual canon by the humanists surely changed their views on ancient Roman law, but it did not prevent them from building on the work of their medieval predecessors, much as they might criticise them. From the humanist perspective, the writings of the medieval jurists were just another source of arguments to bring into the discussion and they would measure them critically as they would even the *Corpus Juris* itself. This also applies to Grotius whose work is full of references to medieval civilians and canonists and who underwrites many of their positions.⁷⁵

⁷² More so than most of the neo-scholastic theologians such as Suárez who embedded their reflections into general theological works. Vitoria's famous *Relectiones de Indis* and *De jure belli* could qualify as autonomous expositions but not as comprehensive expositions of the laws of war and peace-making: F de Vitoria, *De Indis et de iure belli relectiones* (Carnegie Institute Washington DC 1917 [1539/1696]). See also F de Vitoria, *Political Writings* (A Pagden and J Lawrence eds) (CUP Cambridge 1991); F Suárez, *Selections from Three Works* (2 vols Clarendon Press Oxford 1944).

⁷³ *The Rights of War and Peace* (n 65).

⁷⁴ DJ Bederman, 'Reception of the Classical Tradition in International Law: Grotius' *De jure belli ac pacis*' (1996) 10 *Emory International Law Review* 1–50; B Straumann, *Hugo Grotius und die Antike: Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Nomos Baden 2007); B Straumann, 'The *Corpus iuris* as a Source of Law between Sovereigns in Alberico Gentili's Thought' in *The Roman Foundations of the Law of Nations* [n 52] 101–23. For sources with more recognition of medieval jurisprudence, see L Benton and B Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Modern European Practice' (2010) 28 *Law and History Review* 1–38; 'Reception of Ancient Legal Thought' (n 39). In a similar vein, the dependence of the neo-scholastics on medieval canonistic jurisprudence has been significantly underplayed. For an affirmation of the role of canon law, see 'Medieval Canon Law and the Formation of International Law' (n 12) 67–76.

⁷⁵ For the critical edition, see H Grotius, *De jure belli ac pacis libri tres* (R Feenstra and CE Persenaire eds) (Scientia Aalen 1993). See also *Grotius et la doctrine de la guerre juste* (n 12).

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The combining of these two approaches to Roman law as well as the increasingly relative approach to the authorities and the framework of systematization granted these early jurists of the law of nations the flexibility to rise to the challenges of their day and age and adapt medieval doctrines to them. These challenges included the achievement of external sovereignty as well as the gradual monopolization of external relations by the main princes of Europe, the more encompassing nature of warfare, religious strife, maritime and imperial expansion. In answering these, the sixteenth and early seventeenth century jurists of the law of nations continued to draw on medieval jurisprudence.⁷⁶

One of the primary contributions of the sixteenth and early seventeenth century jurists was their conceptual disentanglement of the two meanings of *jus gentium*. Richard Zouch (c 1590–1661) famously restored the Roman term of *jus fetiale* for ‘public international law’.⁷⁷

The disentanglement was carried out at the conceptual level but it was certainly not wholly achieved in material terms. The work of Grotius is generally considered to form the synthesis and culmination point of sixteenth-century scholarship, both of neo-scholastics and humanists, as well as the transition point to the classical writers of the seventeenth and eighteenth centuries.⁷⁸ Grotius laid out with great clarity the duality of the law of nations which would become one of the hallmarks of the jurisprudence of the classical law of nations: that of the distinction and interplay between natural and positive law. Grotius distinguished two bodies of *jus gentium*: the primary law of nations, which was natural law as applied to politics and the secondary or voluntary—positive—law of nations. The first applied in the forum of conscience (*forum internum*); the second generated legal effects in the here and now (*forum externum*).⁷⁹

The Dutch humanist marked the transition from a direct appeal to the authority of Roman law to an indirect appeal through the mediation of natural law. After Grotius and until deep into the nineteenth century, mainstream doctrine remained dualist. Although some authors—who have often been classified as positivists—such as Samuel Rachel (1628–1691),⁸⁰ Johann Wolfgang Textor (1638–1701)⁸¹ or

⁷⁶ R Lesaffer, ‘The Classical Law of Nations (1500–1800)’ in *Research Handbook on the Theory and History of International Law* (n 51) 408–40; *Völkerrechtsgeschichte* (n 19) 117–68.

⁷⁷ R Zouch, *Iuris et iudicii feialis, sive iuris inter gentes, et quaestionum de eodem explicatio* (JL Brierly trans) (2 vols Carnegie Institute Washington DC 1911 [1650]).

⁷⁸ H Bull, B Kingsbury and A Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press Oxford 1990); *Grotius et la doctrine de la guerre juste* (n 12); *A Normative Approach to War* (n 1); *The Rights of War and Peace* (n 65) 78–108.

⁷⁹ H Grotius, *De jure belli ac pacis* (FW Kelsey trans) (2 vols Carnegie Institute Washington DC 1913 [1625/1646]) 1.3.4.1, 3.3.4–5 and 3.3.12–13.

⁸⁰ S Rachel, *De jure naturae et gentium dissertationum* (JP Bate trans) (2 vols Carnegie Institute Washington DC 1916 [1676]).

⁸¹ JW Textor, *Synopsis juris gentium* (JP Bate trans) (2 vols Carnegie Institute Washington DC 1916 [1680]).

Cornelius van Bynkershoek (1673–1743)⁸²—focused on positive law, they did not reject the foundational role of natural law.⁸³ As Grotius had done, most authors distinguished between a primary natural law, which was applicable to human beings, and a secondary natural law (or primary law of nations), which was derived from it and was applicable to states.⁸⁴ Through this, a basis for the entanglement between private and international law was retained.

By the mid-seventeenth century, mainstream doctrine had fixed the locus for the universal validity of the law of nations in natural law. But for many of the writers of the period, primary natural law as applicable to individuals provided the broader context for the law of nations. The great treatises of the naturalists of the seventeenth and eighteenth century, starting with Grotius, did not restrict themselves yet to *jus gentium* as the law applicable to the relations between polities, but encompassed lavish discussions on private law.⁸⁵ And even when writers did restrict themselves to the law of nations properly speaking, private (Roman) law references and analogies continued to loom large. In fact, much of the medieval and sixteenth-century civilian and canonist doctrines were recycled into the law of nations under the hood of natural law. Examples of this are just war, the principle of *pacta sunt servanda* or the doctrine of the right of sovereigns to punish grave violations of natural law such as cannibalism or incest.⁸⁶ The locus of their authority had changed from Roman or canon law to natural law, but the doctrines themselves were not surrendered. This was far more apparent for Roman law, which still had a spontaneous association with being universal and thus constituting more of a treasure trove for the discovery of natural law principles than it was for canon law. Nevertheless, through the intertwining of Roman and canon law during the fourteenth and fifteenth centuries—as in relation to treaties and *jus ad bellum*—the historical impact of canon law was assured. In some instances, new or renewed analogies to Roman law were made, as with the development of the doctrines of *occupatio* and *uti possidetis* for the legitimation of colonial expansion.⁸⁷

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⁸² C van Bynkershoek, *Quaestionum juris publici libri duo* (T Frank trans) (2 vols Clarendon Press Oxford 1930 [1737]).

⁸³ For the nineteenth century, see C Sylvest, 'International Law in Nineteenth-Century Britain' (2004) 75 *British Yearbook of International Law* 9–69.

⁸⁴ See also E Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Pédone Paris 1998); E Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP Cambridge 2012) at 11–106; M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP Cambridge 2005) at 71–122; A Orakhelashvili, 'The Origins of Consensual Positivism—Pufendorf, Wolff and Vattel' in *Research Handbook on the Theory and History of International Law* (n 51) 93–110.

⁸⁵ The main examples include the works of Samuel Pufendorf (1632–1694) and Christian Wolff (1679–1754). See S Pufendorf, *De jure naturae et gentium libri octo* (CH Oldfather and WA Oldfather trans) (2 vols Clarendon Press Oxford 1934 [1688]); C Wolff, *Jus naturae methodo scientifica pertractatum* (8 vols Hildesheim Olms 1968–72 [1740–48]); C Wolff, *Jus gentium methodo scientifica pertractatum* (JH Drake trans) (2 vols Clarendon Press Oxford 1934 [1749]).

⁸⁶ *The Rights of War and Peace* (n 65) 34–40 and 81–9.

⁸⁷ A Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c 1500–c 1800* (Yale University Press New Haven 1995).

The classical writers of the law of nations of the seventeenth and eighteenth centuries also continued the process of systematization that the commentators had started and the humanists had brought up to speed. Against the backdrop of the claims to universality and rationality which were made for natural law, medieval and later doctrines were brought to a higher level of abstraction and generality, then to be flexibly adapted to relations between states when applied in the context of the law of nations.⁸⁸

5 THE MODERN AND POST-MODERN AGES (NINETEENTH TO TWENTIETH CENTURIES)

In 1927, Hersch Lauterpacht (1897–1960) published his *Private Law Sources and Analogies of International Law*.⁸⁹ Lauterpacht listed numerous instances of the use or transfer of private law into public international law. He readily associated private law and Roman law, even mixing the terms at times. Lauterpacht saw three different points of impact of Roman private law upon public international law. First, there was the historical role of civilian jurisprudence in the formation of international law during the Early Modern Age. Secondly, Roman law still had an indirect impact as it was an important historical source for—primarily but not exclusively—the municipal systems of the countries of the civil law tradition. Because Roman law was their common root, it was convenient shorthand for articulating the ‘general principles of law as recognised by civilised nations’ which the *Statute of the Permanent Court of International Justice* had named as one of the sources of international law.⁹⁰ Thirdly, Roman law remained, even up until Lauterpacht’s day, a direct source for private law analogies because it was still considered, *ratio scripta*. The latter was particularly valid for common lawyers in whose system of private law Roman law had been less incorporated and in whose minds had better retained its position as an articulation of natural law or general principles.

⁸⁸ As with the doctrine of *occupatio* which now, contrary to what had been the case under Roman *jus civile*, became generally applicable to land. See ‘Acquiring Empire by Law’ (n 74) 12–8; ‘Argument from Roman Law in Current International Law’ (n 10) 40–4.

⁸⁹ H Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans & Green London 1927).

⁹⁰ *Statute of the Permanent Court of International Justice* (1921) art 38(3). See also *Statute of the International Court of Justice* (1945) art 38(3).

Lauterpacht's empirical study of nineteenth-century adaptations and analogies of (Roman) private law has not yet been surpassed and makes a convincing argument that the transfer from private law to international law did not come to an end in the eighteenth century. One might argue that the rejection of natural law by late nineteenth-century and early twentieth-century positivists as a material source of law forced them to transfer doctrines from the world of natural law to that of positive law.⁹¹ But Lauterpacht's interest was not historical, nor did his work lead to a renewed interest in the historical impact of Roman private law on international law. Lauterpacht construed his book as a defence for the use of private law analogies as a way of articulating 'general principles of law'.⁹² In this he was to be disappointed by later twentieth century practice, most assuredly in relation to Roman law. A perusal of the jurisprudence of the International Court of Justice shows no new direct appeals to Roman law to introduce new doctrines of international law or new interpretations thereof.⁹³ Roman law has now ceased to play a role in the formation of international law. It can, finally, be relegated to history.

⁹¹ Such as the doctrine of self-defence: see *War and the Law of Nations* (n 9) 241–6.

⁹² 'Argument from Roman Law in Current International Law' (n 10) 26–38.

⁹³ H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP Oxford 2013) vol 1, at 232–46 and vol 2, at 1201–5.